

No. 2360

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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**THE BEATSON COPPER COMPANY,**  
*a Corporation,*

*Plaintiff in Error,*

*vs.*

**JOHN PEDRIN,**

*Defendant in Error.*

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**Petition for Rehearing on Behalf of  
Plaintiff in Error.**

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R. J. BORYER,  
MYRICK & DEERING,  
*Attorneys for Plaintiff in Error.*

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Filed  
THE JAMES H. BARRY CO

MAY 1 - 1914

F. D. Montague,  
*Clerk.*



IN THE  
**United States Circuit Court of Appeals**  
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THE BEATSON COPPER COM- PANY (a Corporation),  vs.  JOHN PEDRIN,  <i>Defendant in Error.</i>	<i>Plaintiff in Error,</i>	} No. 2360.

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PETITION FOR REHEARING ON BEHALF  
OF PLAINTIFF IN ERROR.

Plaintiff in error respectfully petitions this Honorable Court for a rehearing, believing that thereby substantial justice will be done in this cause.

The points to which counsel upon both sides have chiefly directed their attention upon this appeal, involved the giving and refusal to give certain instructions. We believe that in our brief and arguments we have conclusively demonstrated that the trial Court erred in instructing the jury herein. In their argument before this Honorable Court counsel for the defendant in error failed to answer any of our contentions to the effect that said instructions were erroneous. No objection was made by defendant in error to the

manner in which exceptions were taken by plaintiff in error to the giving and refusal to give certain instructions to the jury. In fact, far from objecting to the plaintiff's manner of taking and preserving its exceptions, it affirmatively appears from the record that defendant in error consented to the manner in which the exceptions were taken. Nevertheless this Honorable Court has declined to consider the errors complained of for the reason that the exceptions were not stated while the jury were at the bar.

We respectfully urge that the rule referred to in the opinion of this Honorable Court should not be invoked in all of its strictness in the present case. And this for two reasons. The first is that both parties litigant have solemnly covenanted that this procedure may be followed. Certainly where both litigants have agreed to waive a rule of law, they should be bound by their waiver, when the matter is heard on appeal. Were it not for this stipulation of defendant in error the formality of excepting in explicit terms to the charge of the Court, or its refusal to charge as requested, would have been observed by counsel for plaintiff in error. It does not appear to be just or right that this stipulation should be disregarded and a judgment affirmed, despite the substantial errors which are practically admitted by our opponents.

A further reason why this harsh rule should not be applied is apparent from an inspection of the entire record. When we consider the reason underlying

the rule of law it is evident that exceptions are to be taken while the jury is at the bar, so that the trial Judge may have an opportunity to reconsider and correct his instructions. Manifestly the idea is that counsel should point out the Judge's error and by so doing prevent mistake.

In the cause now before Your Honors, the attention of the trial Court was, as we believe, sufficiently directed to the very points involved in the erroneous instructions of which we complain. The first affirmative defense interposed in defendant's answer, the motion for a nonsuit, and the motion for directed verdict, all presented these matters to the trial Judge. It may be true, as is said in the opinion of this Honorable Court, that this cause is one which should properly have been submitted to the jury under suitable instructions. But the record shows that the matters upon which the law was improperly stated by the trial Judge were so forcefully brought to his mind during the trial of the cause that formal exception to the particular instructions in the presence of the jury would have been but an idle act.

In addition to this the instructions requested by plaintiff in error, and refused by the trial Court, clearly indicated to the trial Court the erroneous character of the instructions he elected to give.

We submit that the judgment heretofore rendered herein should be set aside and a rehearing granted, for the reason that the instructions given by the trial Judge

were erroneous, that the rule requiring exceptions to be taken while the jury is at the bar was expressly waived by plaintiff below, and for the further reason that in this case the reason for the rule ceases to exist since the attention of the trial Court was explicitly drawn to these errors during the entire conduct of the case.

Respectfully submitted.

R. J. BORYER,  
MYRICK & DEERING,  
Attorneys for Plaintiff in Error.